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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Section 302 of)	CS Docket No. 96-46
the Telecommunications Act of 1996)	
)	
In the Matter of)	
)	
Telephone Company-Cable)	CC Docket No. 87-266
Television Cross-Ownership Rules,)	(Terminated)
Sections 63.54-63.58)	

To: The Commission

**COMMENTS OF THE ASSOCIATION OF
AMERICA'S PUBLIC TELEVISION STATIONS**

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TELEVISION STATIONS
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The Association of America's Public Television Stations ("APTS") submits these comments in response to the Commission's Notice of Proposed Rulemaking in CS Docket No. 96-46 ("Notice"). The Notice seeks comment on the issues involved in the development of rules applicable to open video systems, recently established by the Telecommunications Act of 1996.

I. Introduction and Summary of Position

APTS is a nonprofit organization whose membership includes nearly all of the nation's 179 public television licensees. APTS engages in planning and research activities on behalf of its members, as well as representing them in legislative and policy matters before the Commission, Congress, and the Executive Branch.

The Telecommunications Act of 1996 ("Act") repealed the telephone-cable cross-ownership restriction and the video dialtone rules and established, inter alia, a new section 653 of the Communications Act, which provides for the delivery of video programming by means of an "open video system" ("OVS"). The Act provides that OVS operators are subject generally to certain non-discrimination requirements similar to Title II regulations and some specific requirements applicable to cable operators under Title VI.

Open video systems offer great promise as new distribution systems for video programming. Public television stations can utilize OVS not only for carriage of their traditional over-the-air programming, but also for distribution of a wide range of educational and community service offerings. Multiple channels of educational services are provided now by only a handful of stations—generally state networks—that have more than a single broadcast channel available to them. These stations use state or regional funded satellite systems, microwave and ITFS systems, cable television, and telephone lines to deliver a wide range of educational services to schools, libraries, hospitals, prisons, daycare centers, and state and local agencies. OVS would provide every public television licensee with the capacity to deliver educational services to these diverse users.

In order to guarantee public television the ability to access OVS, it is essential that the Commission, at a minimum, take the following two steps: (1) include in its OVS rate regulations the requirement that OVS operators must guarantee access to public telecommunications entities at preferred rates, and (2) develop regulations to apply the must carry law specified in the Act to OVS operators in a manner that is consistent with the principles that Congress intended to foster. APTS supports adoption of FCC rules to secure

these two means of allowing access by public television licensees to OVS operations for their programming and related educational services.

II. Public Telecommunications Providers Should be Afforded Preferential Rates by OVS Operators

Access to OVS capacity on a preferred rate basis would provide public television with a consistent, reliable, advanced distribution system to provide its educational services.¹ This in turn would enable stations to realize Congress' intent to extend affordable public services to all states and communities in the country. Access to OVS at preferred rates will ensure that this powerful new technology will be utilized for noncommercial educational services and that the educational potential of the "information highway" will be realized. In addition, it will facilitate public television's current efforts to extend the information highway's reach to underserved, minority and economically disadvantaged communities nationwide.

A. Granting Preferential Access for Public Telecommunications Entities Will Serve the Public Interest

1. OVS Offers Significant Opportunity to Extend and Enhance Public Telecommunications Services

Along with public schools, college and libraries, public television stations serve as an essential educational institution in communities across the country. By 1995, more than 30 million elementary and secondary school children could receive classroom instruction and educational enrichment via

¹ APTS believes that incremental cost-based rates are the most appropriate measure of preferred rates for public telecommunications entities. An incremental cost-based rate is the lowest rate that is consistent with the long run incremental cost or out-of-pocket cost (whichever would be lower) of the operator in providing OVS. OVS providers would charge only those costs that would be unavoidably incurred in transmitting public telecommunications programming. Under such a system, the OVS provider fully recovers its costs and the public telecommunications entities are able to gain affordable access to OVS.

public television, and more than 2.8 million students had received college credit for courses provided by local public television stations. More than 350,000 people were enrolled in such courses during 1995 alone, making public television the largest "university" in the country.

The educational services provided serve a multitude of local community needs and reach into millions of homes, classrooms and workplaces. Children at home and in childcare centers learn the alphabet from *Sesame Street*; rural high school students take distance learning courses in advanced math and foreign languages that would never be available in their local schools; high school drop-outs earn their GEDs and then go on to earn college degrees through broadcast telecourses; and workers upgrade their skills and expand their horizons through continuing education courses and live, interactive video conferences.

South Carolina Educational Television Network ("SC ETV") provides a good example of what services public television can offer if the access to technological means is available.² SC ETV's digital satellite network was launched in 1993, utilizing PBS transponders on Telstar 401. Using digital compression, the network can provide up to 32 channels of programming simultaneously. The satellite transmissions are linked with an extensive terrestrial network of broadcast transmitters, ITFS stations, cable television distribution facilities, and microwave links.

These facilities have enabled SC ETV to provide video and audio programming and live interactive teleconferences to locations throughout

² See Written Statement of Henry Cauthen, President of SC ETV, FCC En Banc Hearing on Spectrum Policy, March 5, 1996.

the State of South Carolina—and users in other states as well—on an extremely cost-effective basis.

- SC ETV provides instructional programming to over 98 percent of South Carolina's elementary and secondary school students, allowing an expanded curriculum on a live interactive basis and more equitable educational opportunities all over the state, particularly in rural school districts where educational opportunities would otherwise be much more limited.
- In cooperation with the University of South Carolina, Clemson, MUSC, and South Carolina State University, SC ETV provides 160 college-credit courses to 12,884 students. All 33 public colleges and independent colleges in the state are equipped with satellite dishes and digital receivers.
- Working closely with the Medical University, the Department of Health and Environmental Control and other health agencies, SC ETV delivers more than 1,700 hours of closed circuit medically oriented programming to 89 locations, including hospitals, mental health offices, health education centers, rural clinics, technical schools and even correctional institutions.
- SC ETV's Public Services Network delivers programming by satellite to all elements of the state's criminal justice system—court houses, law enforcement agencies, local detention centers, correctional institutions—as well as public safety agencies such as fire stations and paramedical units. The participating agencies realize substantial cost savings and achieve greater efficiencies by using the network for continuing education and operational purposes.
- SC ETV transmits the Municipal Association's "Hometown Network" to local elected officials at ten Council of Government sites around the state. This network increases the effectiveness of local governments and reduces their costs by providing training sessions to local officials without requiring them to incur travel costs or leave their communities.
- Through its BusinessLink service, SC ETV provides undergraduate, graduate and technical training programming to businesses across the state. BusinessLink also permits state government offices to provide services and information directly to work sites. In addition, BusinessLink's teleconferencing capability permits employees at

remote work sites to participate in interactive discussions with state agencies and business innovators around the country.

Today, only some public television stations are capable of delivering the type of services offered by SC ETV. These stations must rely on a variety of technologies, including state-funded satellite, fiber or microwave networks, partnerships with cable operators and costly phone connections. Unfortunately, these distribution technologies are unavailable or unaffordable for the majority of public television licensees. The broadband, interactive, on-demand capabilities expected with OVS would make it possible for each station to become a multiple service provider rather than a single broadcast channel programmer. The broadband capacity will allow for the delivery of multiple streams of educational services to homes, schools, libraries, daycare facilities, training centers, medical facilities and job sites. The interactive capability will allow public television to increase and enhance its current interactive educational services, and the on-demand capacity will make these services available to teachers, students and others when and how they need them.

2. Requiring Public Telecommunications Entities to Pay Commercial Rates for OVS Will Impair the Distribution of Public Telecommunications Services

Paying commercial rates for the capacity to distribute educational services is not an option for most public television stations. First, public broadcasters, in line with Congress' mandates,³ are firmly committed to the widest possible dissemination of educational services at the lowest possible cost. Commercial video information providers recoup the costs of developing

³ See 47 U.S.C. § 396(a)(7) and 47 U.S.C.A. § 396(a)(9).

and disseminating services through subscription fees, pay-per-view billing mechanisms or commercial advertisements. None of these are options for public broadcasters. Charging for public telecommunications services would directly undermine Congress' goal to "ensure that all citizens . . . have access to public telecommunications services through all appropriate available telecommunications distribution technologies" 47 U.S.C.A. § 396(a)(9).

Moreover, such services simply cannot be fully supported by users. The long-standing federal policy of facilitating access to public telecommunications services is premised on the fundamental principle that the marketplace simply will not and cannot support the development and dissemination of certain educational and cultural services. Over the years, Congress has recognized that "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."⁴ Congress found that public television strives "to present the very best in television programming, to bring to the American people that which is unavailable anywhere else, and to develop programs that meet the needs of underserved and diverse audiences throughout the country."⁵ Public television's "original mandate" is to serve as "an educational, innovative and experimental alternative to commercial broadcasting."⁶

Public broadcasters, in line with Congress' direction, fill voids left by the commercial marketplace. They provide quality, in-depth, educational, cultural and public affairs programming (47 U.S.C § 396(a)(1)); serve the

⁴ H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967).

⁵ H.R. Rep. No. 82, 97th Cong., 1st Sess. 21 (1981).

⁶ H.R. Rep. No. 825, 100th Cong., 2d Sess. 10 (1988).

unserved and underserved audiences, particularly minorities and children (47 U.S.C. § 396(a)(6)); utilize the electronic media to engage in community and outreach programs (47 U.S.C. § 396(a)(8)); and provide an alternative to commercial programming that must have mass audience appeal (47 U.S.C. § 396(a)(5)). This type of service is not and cannot be a marketplace-supported service.

Finally, public broadcasting's scarce resources, obtained through combinations of federal and state funding, underwriting, and viewer contributions, are already stretched to maintain public broadcasting services. Given public broadcasting's scarce resources, the costs of accessing OVS puts the technology out of reach.

If public television stations were required to pay commercial marketplace rates to OVS, they generally would be faced with two undesirable alternatives: 1) forego any use of OVS for distribution of public service programming to the public; or 2) deliver only those services that are able to generate sufficient revenues to cover the costs of access. Under the first alternative, public broadcasters—the major providers of noncommercial educational telecommunications—simply would not have access to this advanced and more versatile distribution technology. Further, the public would be denied access to the enhanced educational services that will be possible through OVS.

The second alternative would, in essence, require public broadcasters to distribute only commercially viable services on OVS. This would run counter to Congress' directives—to serve the culturally diverse, unserved and underserved pockets of the American public and to provide an alternative to mass appeal, commercial program services. Simply put, if the Commission decides to permit public service providers access to OVS only on strict

marketplace terms, it will restrict the public's access to public telecommunications services.

OVS providers are likely to play an integral part in the development of this nation's information superhighway. One of the overriding concerns is that new, multichannel interactive services be available to all socio-economic groups, not merely the "haves" of this country. Public telecommunications providers must be able to access OVS technology on a preferential-rate basis to ensure that their educational programming can be made available to the less-advantaged members of our society for the lowest possible cost. To help maintain full public access to these services, the Commission should require OVS providers to offer access to public telecommunications entities at reduced rates.

B. Long-standing, National Policy Favors Facilitating Access to Distribution Technologies for Public Telecommunications Services

The nation's public telecommunications entities represent the only locally-controlled programming services in the United States whose sole purpose is to distribute educational, informational, cultural and instructional programming at the community level. Congress and the Commission have long recognized the public interest benefits of public telecommunications services and have adopted a policy of ensuring that all citizens have access to public telecommunications programming.⁷

⁷ "Public telecommunications entity," as defined in Section 397 (12) of the Act, includes "public broadcast station[s] or noncommercial television communications entit[ies]" that disseminate "non-commercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications." See Sections 397 (12) and (14), 47 U.S.C. §§ 397 (12) and (14).

1. The Access Policies of Congress

In 1967, in the Public Broadcasting Act, Congress amended the Communications Act to provide that “it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States.”⁸ In furtherance of this policy, Congress made it explicit that public telecommunications entities may receive preferential access to common carrier transmission facilities. The Public Broadcasting Act of 1967 added Section 396(h) of the Communications Act, which provides that “[n]othing in [the Communications Act], or in any other provision of law, shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for public television or radio services[.]” 47 U.S.C. § 396(h)(1).

As new technologies for transmitting video programming to consumers have developed, Congress has repeatedly responded to ensure that educational public telecommunications services will be available to the public on these emerging technologies. In 1978, Congress amended the Communications Act to provide that it is in the public interest to “extend delivery of public telecommunications services to as many citizens as possible by the most efficient and economical means, including use of broadcast and nonbroadcast technologies.”⁹ This policy was reiterated in the Public

⁸ The Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §396(a)(7) (1988 & Supp. IV 1992)).

⁹ The Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, 92 Stat. 2405 (codified at 47 U.S.C. § 390 (1988)) (emphasis added).

Telecommunications Act of 1992, which amended the Communications Act to state that “it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies....¹⁰

This policy of facilitating access for public telecommunications also has applied to cable television. In the 1992 Cable Act, Congress required cable television systems to carry public television stations, recognizing “a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations....”¹¹ Congress reaffirmed the “compelling interest in ensuring that [public telecommunications services] remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and informational services.”¹² Congress further concluded that the marketplace will not support carriage of public telecommunications programming, finding a “substantial likelihood” that citizens will be deprived of these services absent mandatory carriage requirements.¹³

¹⁰ The Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C.A. §396(a)(9) (West Supp. 1994) (emphasis added).

¹¹ The constitutionality of the “must carry” provisions was addressed in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), in which the Supreme Court determined that “must carry” is a content-neutral restriction and should be sustained if it furthers important governmental interests without burdening speech more than is necessary to further those interests. The Court confirmed that the reasons Congress articulated for the “must carry” provisions are important governmental interests, but remanded the case to the district court to hold further evidentiary proceedings to determine whether the “must carry” provisions will in fact advance those governmental interests. The District Court, in a 2-1 decision found that there was substantial evidence upon which Congress could base a reasonable determination that must carry advanced important governmental interest. That decision is now on appeal in the Supreme Court.

¹² H.R. Rep. 682, 101st Cong. 2d Sess. 47 (1991) (emphasis added).

¹³ 1992 Cable Act, § 2(a)(8)(D), Pub. L. No. 102-385, 106 Stat. 1460, 1461. Also in the 1992 Cable Act, Congress required that a DBS service provider reserve between a four and seven percent of its

2. The Access Policies of the Commission

The Commission also has long recognized the unique needs of public telecommunications entities and has adopted policies to ensure public access to such services. In its original reservation in 1952, the Commission reserved 242 channels on the Ultra High Frequency ("UHF") spectrum for educational television.¹⁴ More recently, in 1992, the Commission committed to carry over this channel reservation policy in its allotment of advanced television channels to broadcasters.¹⁵ In applying this policy, the Commission acknowledged "the important role noncommercial educational stations play in providing quality programming to the public and financial constraints they face in building and running their stations."¹⁶

In implementing Section 396(h)(1) of the Act, the Commission found that "the public interest is served by the expansion of noncommercial educational broadcasting service to the public through free or reduced rate

channel capacity "exclusively for noncommercial programming of an educational or informational nature." DBS providers must make this capacity available at preferential rates established by the Commission. 1992 Cable Act, § 25, 106 Stat. at 1501 (codified at 47 U.S.C. § 335 (b)(1) (Supp. IV 1992)). Section 335 has been declared unconstitutional by the district court in Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 8-9 (D.D.C. 1993), on the grounds that there was not sufficient justification in the record for the set aside. APTS submits that there is sufficient justification for the reservation in the Communications Act, and has appealed the case on this and other grounds. See Daniels Cablevision, Inc. v. United States, No. 93-5290 (D.C. Cir.). The case was argued in the fall of 1995 and a decision is pending.

¹⁴ Television Assignments, Sixth Report and Order, 41 F.C.C. 18, 148 (1952).

¹⁵ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Second Report and Order/Further Notice of Proposed Rulemaking, F.C.C. Rcd. 3340, 3350, ¶¶ 36-37 (1992); Memorandum and Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 6924, 6950-51, ¶¶ 33-34 (1992).

¹⁶ Second Report and Order, 7 F.C.C. Rcd. at 3350, ¶ 36.

interconnection common carrier services for education broadcast stations.”¹⁷ Though the Commission opted not to mandate preferential interconnection rates, the Commission advised the carriers that it “expected the carriers to provide [interconnection service at preferential rates] and that the Commission considered it to be in the public interest for the carriers to do so.”¹⁸

With regard to cable, the Commission has concluded that mandatory carriage of public telecommunications programming is necessary to ensure public access. In its 1990 Cable Report to Congress, the Commission stated, “Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal.”¹⁹

OVS offers great promise as a new video programming service and ultimately may become the dominant technology for video transmission. Therefore, the long-standing federal policy of ensuring that public telecommunications entities have access to all available telecommunications distribution technologies must be applied to OVS systems as well. In paragraph 32 of the Notice, the Commission raises the issue of what justification is necessary to reach the situation that Congress intended to make “discrimination” in rates “just and reasonable.” Given Congress’ well-

¹⁷ Free or Reduced Rate Interconnection Service for Noncommercial Educational Broadcasting, Memorandum Opinion and Order, 20 F.C.C. 2d 491, 493 (1969).

¹⁸ Id.

¹⁹ Competition, Rate Deregulation, and the Commission’s Policies Relating to the Provision of Cable Television Services, 5 F.C.C. Rcd. 4962, 5044 (1990).

established precedent of assuring access to new technologies for public telecommunications entities, any discrimination in favor of preferred rates for public telecommunications services to allow access to OVS is mandated by Congress, is in the public interest and could not conceivably be considered unjust or unreasonable. The Commission therefore can and should require that OVS operators provide preferential access and assurance of available capacity for public telecommunications entities.

III. Applying the Must Carry Provisions of Section 615 to OVS Must Take Into Account The Congressional Purposes

Section 653 of the Telecommunications Act directs the Commission to develop regulations to apply Section 615 of the Communications Act, which contains the must carry provisions for public television stations on cable systems, to OVS operators. The Commission's Notice raises various questions in terms of adopting rules to implement the must carry law in relation to OVS operators. It is difficult to speak with certainty regarding the actual applications of the must carry provisions to OVS operators because there are many unknowns in terms of how such a system will function. However, APTS urges the Commission to keep in mind several broad principles, discussed below, in developing its OVS must carry regulations. The Commission must ensure that Congress' purposes in applying Section 615 mandates to Section 653 will be fostered through OVS must carry regulations.

A. Importance of Must Carry of Local Public Television Stations by OVS Providers

When Congress enacted the 1992 Cable Act, it required cable systems to carry the signals of a minimum number of noncommercial television stations, depending on the size of the cable system. That obligation was

designed to achieve two goals: (1) to assure that cable subscribers have access to public television programming and (2) to preserve the vibrancy and viability of the nation's public television system. Congress found that cable systems effectively controlled the television signals available to their subscribers and were able to deny more than 66 percent of the nation's households access to public broadcasting. Congress also concluded that the loss of any significant portion of that cable audience would jeopardize the financial viability of public television stations, thereby threatening the availability of public television programming to all Americans.

As public broadcasting stations provide programming that is not market-driven, basic economic theory indicates that, without must carry provisions, OVS operators, similar to cable operators, would carry that combination of programming most likely to maximize their subscriber base and revenues—without regard to whether any of the programming includes signals of local public television stations serving local community needs. Such actions would undermine the ability of local public television stations to provide responsible local service by denying access to audiences. This loss of access is especially injurious for stations that are trying to provide alternative program services.

The denial of access also results in the loss of important sources of revenue. As the Commission is aware, most public television stations are highly dependent on subscriber contributions in order to provide the quality of service they believe is required. Those stations do not have the capital base of commercial operators and, as the Commission and the courts have recognized, any loss of subscriber support will affect the quality of public

television services.²⁰ Given the economics of broadcasting, these losses in revenue may translate into losses in local programming or a reduction in the quality of that programming, which would be detrimental to service to the public and contrary to the public interest.

B. Must Carry Regulations Must Be Adopted with Several Important Principles in Focus

In establishing rules to implement the must carry law for OVS operators, APTS implores the Commission to be guided by the following principles that will serve to keep in focus the twofold purposes of Congress in enacting Section 615 of the Communications Act.

1. All Subscribers Must Have Access to All Must Carry Stations' Programming

In its Notice, paragraph 59, the Commission addresses the issue of how OVS operators with multiple program packages can provide the must carry channels to the subscribers, who may have the option of choosing among program packages. Section 615(h) of the Communications Act makes clear the requirement that "(s)ignals carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier . . ." (emphasis added). This requirement manifests the overarching goals of Congress: to assure that all subscribers have access to noncommercial educational programming and to assure public television licensees have access to their audiences.

²⁰ See Public Cable Co., 64 F.C.C. 2d 701 (1977); see also Turner v. F.C.C., supra, at 21, in which the District Court found that "a reduced audience decreases a public station's ability to get viewer contributions. When the revenue declines, the station's ability to provide quality programming is hampered, further decreasing the viewing audience and creating a vicious cycle of declining financial stability and health."

It is imperative that the Commission require no lesser standard of accessibility in its development of the OVS rules. APTS cannot predict, until the technology unfolds, whether the best means of packaging the must carry channels will be in a lowest priced basic tier or within each program provider's package. At this early stage, the Commission should articulate the basic principle—that every subscriber must have easy access to every must carry channel—and leave the docket open to prescribe specific rules as the technology unfolds.

2. Carriage of Analog/Digital Signals

With a view toward the transition from analog to digital transmission, it is important that the must carry OVS provisions apply to public broadcasters' analog and digital signals. Because the policies underlying the must-carry rules apply equally to both the NTSC and ATV channels, and OVS carriage of both is essential to an orderly and rapid transition to ATV, the Commission should require OVS providers to carry both broadcast signals. Such an obligation is required by the policy and the language of Section 615 of the Communications Act. Section 615 requires cable operators to carry, subject to certain restrictions, all signals of qualified stations. Thus, Section 615 as applied to OVS operators would require carriage of both analog and digital signals of stations qualified for carriage.

Requiring both ATV and NTSC signals not only furthers the important governmental interests that underlie Section 615, but also furthers the successful and speedy transition to ATV broadcast services. Assured access on OVS will facilitate broadcasters' ability to make the investments required for ATV construction and program production, permit broad public acceptance of

ATV/HDTV, advance the penetration of reasonably priced ATV sets in the marketplace and ultimately facilitate the transition to ATV.

3. Carrying the Signal in its Entirety

Section 615(g) requires the cable operator to “retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system(.)” In addition, cable systems are required to retransmit “to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.” Similarly, OVS operators should carry qualified public television signals in their entirety, including all line 21 closed captioning and VBI materials.

Further, APTS submits that OVS operators should carry all program-related educational materials offered by qualified noncommercial stations. As discussed above, public television licensees augment their broadcast services with program-related materials designed to enhance their educational programming at the national, state and local levels. Digital technology offers exciting possibilities to increase and expand these offerings. Public television will be able to distribute program-related course materials, textbooks, student and teacher guides, computer software and content areas of the World Wide Web to students and faculty, concurrently with the broadcast of educational programming. Distribution of these transmissions via OVS under the must carry provisions is essential to allow subscribers to receive the educational offerings accompanying public television licensees’ programming.

4. Qualifying Stations

In paragraph 60 of the Notice, the Commission asks for comments on what broadcast stations would qualify for carriage under the must carry provisions. Under Section 615(l)(1) a qualified noncommercial educational television is defined as any television that: (1)(i) is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and (ii) has as its licensee an entity which is eligible to receive a community service grant from the Corporation for Public Broadcasting; or (2) is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.

Under Section 615(l)(2), a qualified “local” noncommercial educational television station must satisfy one of two requirements: (1) it must be licensed to a principal community whose reference point (as defined in 47 C.F.R. § 76.53) is within 50 miles of the principal headend of the cable system; or (2) its Grade B service contour (as defined in 47 C.F.R. § 73.683(a)) must encompass the principal headend of the cable system.

The number of qualifying local noncommercial stations carried under the must carry provisions of Section 615 is structured in relation to the number of channels available on the cable system. Cable systems with more than 36 channels must carry all qualified local public television stations.

As the Commission notes, the Telecommunications Act requires that, in applying Section 615 to OVS operators, the implementing regulations should establish no lesser or no greater obligations upon the OVS operators than those imposed upon cable operators. Thus, adopting a similar qualifying scheme for OVS operators logically leads to the conclusion that OVS operators should be required to carry all qualified local public television

stations. The number of channels on an OVS will greatly exceed the number of channels currently available under any existing cable system. In fact, with the use of “switched digital” video technology, as discussed in paragraph 18 of the Notice, OVS operators may be capable of expanding capacity on an almost unlimited basis.²¹

5. Notification

In its Notice, paragraph 14, the Commission raises the issue of establishing sufficient notification procedures for programmers generally to be made aware of available capacity on OVS. Specifically with regard to the noncommercial stations qualified for carriage under the must carry provisions, APTS recommends the following notification safeguards be put into place.

Similar to the cable television must carry notification requirements contained in Section 76.58 of the FCC’s rules, the OVS operator should be required, at a minimum, to serve by certified mail a written notification to all public television stations qualified for carriage on the OVS. Further, the qualified noncommercial stations should not be limited by a time period for asserting their must carry rights.

6. Channel Positioning

The Commission, in paragraph 22 of its Notice, requests comments on the scheme that should be used for channel assignments by OVS providers. This issue is particularly important in relation to the noncommercial stations carried under the must carry provisions. Section 615(g) gives a

²¹ APTS agrees with the Commission’s tentative conclusion in paragraph 19 of its Notice that the stations carried under the must carry provisions would not be counted in the one-third amount of channels programmed by the OVS operators by choice.

noncommercial station the option of electing to be carried on either the channel on which it was carried by the cable system at the time, the station's off-air channel, or any other channel "mutually agreed upon by the station and the cable operator." Further, a station may not be repositioned unless the cable system provides at least thirty days notice to the station and to all the subscribers of the cable system.

If there are conventional channels on OVS, rules that track these cable provisions should apply. If the conventional channel scheme does not exist on OVS, the FCC should establish rules that are guided by the following principle: public broadcasters must have preferred positioning on OVS to ensure that access by subscribers is quick, easy and clear. The FCC should leave this proceeding open for specific rules regarding channel positioning or accessibility as may be necessary.

CONCLUSION

With OVS, each public television station would have the capacity to offer a wide range of educational and community outreach services simultaneously to different audiences. In order to guarantee public television the ability to access OVS, it is essential that the Commission include in its OVS rate regulations the requirement that OVS operators must guarantee access to public telecommunications entities at preferred rates. Further, the Commission must develop regulations to apply the must carry law to OVS

operators in a manner that is consistent with the principles that Congress intended to foster, including assuring the public access to noncommercial television programming services and preserving public television's viability through access to its audience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marilyn M. Thompson", written over a horizontal line.

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